

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SMITHKLINE BEECHAM CORPORATION, doing
business as GLAXOSMITHKLINE,

Plaintiff,

v.

ABBOTT LABORATORIES,
Defendant.

No. C 07-5702 CW

ORDER GRANTING
IN PART AND
DENYING IN PART
PLAINTIFF'S
MOTION FOR ENTRY
OF JUDGMENT
(Docket No. 489)

Plaintiff Smithkline Beecham Corporation, doing business as GlaxoSmithKline (GSK), moves for entry of judgment. Defendant Abbott Laboratories opposes the motion in part. The motion was taken under submission on the papers. Having considered the papers submitted by the parties, the Court GRANTS GSK's motion in part and DENIES it in part.

BACKGROUND

Because the Court's January 14, 2011 Order Denying Abbott's Motions for Summary Judgment amply recites the background of this case, the Court offers a truncated discussion below.

GSK brought four claims against Abbott: (1) violation of the Sherman Act, 15 U.S.C. § 2; (2) breach of the covenant of good faith and fair dealing; (3) violation of the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), N.C. Gen. Stat. § 75-1.1; and (4) violation of North Carolina's prohibition on monopolization, N.C. Gen. Stat. § 75-2.1.

A jury trial in this action began on February 28, 2011. On March 24, 2011, before the case was submitted to the jury, Abbott

1 moved for judgment as a matter of law. See Fed. R. Civ. P. 50(a).
2 The Court did not grant the motion and submitted the case to the
3 jury.

4 On March 30, 2011, the jury rendered its verdict. The jury
5 found for Abbott on GSK's § 2 claim, but for GSK on its claim for
6 breach of the implied covenant. The jury concluded that Abbott
7 breached the implied covenant that inhered to the parties' Norvir
8 license agreement and did so through "grossly negligent conduct."
9 For this, the jury awarded GSK \$3,486,240.00 in damages.

10 For GSK's UDTPA claim, the jury was asked whether Abbott
11 committed any of the three following acts:¹

- 12 a. During the negotiation of the Norvir Boosting License,
13 Abbott was considering how to use its control over Norvir
14 to limit competition with Kaletra and deliberately
15 withheld this from GSK.
 - 16 b. Abbott inequitably asserted its power over Norvir by
17 increasing Norvir's price by 400 percent to undermine and
18 disrupt Lexiva's launch and future sales.
 - 19 c. Abbott manipulated the timing of the 400-percent Norvir
20 price increase in order to disrupt Lexiva's launch and
21 undermine Lexiva's future sales.
- 22
23
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25 ¹ A fourth question, regarding whether Abbott monopolized or
26 attempted to monopolize the market in which Kaletra competes, was
27 included in the preliminary jury instructions. The Court did not
submit this question to the jury because the parties agreed it was
redundant.

1 These questions were based on GSK's proposed jury instructions.²
2 The jury concluded that GSK did not meet its burden to prove that
3 Abbott committed the second or third acts. The jury found that
4 Abbott committed the first act, but that this conduct was not the
5 proximate cause of injury to GSK.

6 DISCUSSION

7 GSK asks the Court to enter judgment as follows: (1) for
8 Abbott on GSK's § 2 claim; (2) for GSK, in the amount of
9 \$4,549,590.96, on its claim for breach of the implied covenant;
10 (3) for GSK, in the amount of \$11,522,070.96, on its UDTA claim;
11 and (4) for Abbott on GSK's claim under N.C. Gen. Stat. § 75-2.1.
12 The amount sought by GSK on its breach of the implied covenant
13 claim includes pre-judgment interest. Abbott does not oppose GSK's
14 motion, except to the extent that GSK seeks judgment in its favor
15 on its UDTA claim.

16 To prevail on a UDTA claim, "a plaintiff must show: (1) an
17 unfair or deceptive act or practice, (2) in or affecting commerce,
18 and (3) which proximately caused injury." Walker v. Fleetwood
19 Homes of N.C., Inc., 362 N.C. 63, 72 (2007). "Whether a trade
20 practice is unfair or deceptive usually depends upon the facts of
21 each case and the impact the practice has in the marketplace."
22 Marshall v. Miller, 302 N.C. 539, 548 (1981) (citation omitted).

23
24 ² GSK explicitly stated that the factual questions posed to
25 the jury reflected the bases of its UDTA claim. During a
26 discussion about the jury instructions at the final pretrial
27 conference, GSK's counsel stated, "We believe the . . . questions
28 that were in the proposed . . . jury instructions that your Honor
passed out are the right ones, because those are the things that we
contend violate the North Carolina unfair competition statute."
Feb. 8, 2011 Tr. at 26:19-22.

1 "A practice is unfair when it offends established public policy as
2 well as when the practice is immoral, unethical, oppressive,
3 unscrupulous, or substantially injurious to consumers." Id.
4 (citation omitted). Whether an act is unfair or deceptive is a
5 question of law for a court. Walker, 362 N.C. at 71. However, a
6 "jury determines in what amount, if any, the complaining party is
7 injured and whether the occurrence was the proximate cause of those
8 injuries." Ausley v. Bishop, 133 N.C. App. 210, 217 (1999) (citing
9 Barbee v. Atl. Marine Sales & Serv., 115 N.C. App. 641, 647
10 (1994)); see also G.P. Publ'ns, Inc. v. Quebecor Printing-St. Paul,
11 Inc., 125 N.C. App. 424, 442 (1997) (affirming denial of JNOV
12 motion on UDTA claim for which jury found that defendant committed
13 the alleged unfair act but that the act did not proximately cause
14 harm to plaintiff).

15 As noted above, GSK provided factual questions that reflected
16 the bases of its UDTA claim. Based on those questions, the jury
17 concluded that GSK did not prove that Abbott increased Norvir's
18 price by 400 percent to undermine and disrupt Lexiva's launch. Nor
19 did GSK prove that Abbott manipulated the timing of the Norvir
20 price increase to disrupt GSK's launch of Lexiva. The jury only
21 found that Abbott deliberately withheld its intent to use its
22 control over Norvir to limit competition. However, the jury found
23 that this act was not the proximate cause of injury to GSK. Thus,
24 the Court need not decide whether this act constituted an unfair or
25 deceptive practice under the UDTA.

26 Nevertheless, GSK insists that the jury's finding that Abbott
27 engaged in grossly negligent conduct when it breached the implied
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1 covenant of good faith and fair dealing warrants judgment in GSK's
2 favor on its UDTPA claim. However, this finding does not support
3 GSK's UDTPA claim. This finding alone does not show that Abbott
4 committed an unfair or deceptive act, as defined by the UDTPA,
5 because it does not speak to the breach's impact on the
6 marketplace, which is a factor to be considered. Additionally, as
7 explained above, GSK committed to rest its UDTPA claim on the acts
8 reflected on the verdict form.

9 GSK points to the jury's finding that "Abbott deliberately
10 withheld that it was considering ways to use Norvir to harm GSK and
11 competitors" GSK's Opp'n to Abbott's JMOL Mot. 9:8-11.
12 This finding cannot support GSK's UDTPA claim; the jury concluded
13 that this act did not proximately cause GSK injury.

14 Finally, GSK argues that the "evidence, viewed in the light
15 most favorable to GSK, could support a finding that Abbott
16 violated" the UDTPA. GSK's Opp'n to Abbott's JMOL Mot. 8:1-2.
17 That the evidence could support such a finding warranted denying
18 Abbott's motion for summary judgment; it does not, however, justify
19 entering judgment in GSK's favor.

20 CONCLUSION

21 For the foregoing reasons, the Court GRANTS GSK's motion in
22 part and DENIES it in part. (Docket No. 489.) The Clerk shall
23 enter judgment for Abbott on GSK's claims under the Sherman Act,
24 the UDTPA and N.C. Gen. Stat. § 75-2.1. The Clerk shall enter
25 judgment for GSK, in the amount of \$4,549,590.96, on its claim for
26 breach of the implied covenant of good faith and fair dealing.
27 This amount includes pre-judgment interest, as provided under New
28

1 York law. Each party shall bear its own costs. The Clerk shall
2 enter judgment forthwith.

3 As noted above, Abbott moved for judgment as a matter of law,
4 pursuant to Federal Rule of Civil Procedure 50(a), before this case
5 was submitted to the jury. To the extent that this motion was
6 directed at GSK's Sherman Act, UDTPA and N.C. Gen. Stat. § 75-2.1
7 claims, the motion is moot. Abbott may renew its motion, pursuant
8 to Rule 50(b), with respect to GSK's claim for breach of the
9 implied covenant. In accordance with that rule, Abbott's motion
10 shall be due within "28 days after the entry of judgment." Fed. R.
11 Civ. P. 50(b). If one is filed, GSK's opposition shall be due
12 fourteen days thereafter, and Abbott's reply shall be due seven
13 days after that. Any renewed motion for judgment as a matter of
14 law will be taken under submission on the papers.

15 IT IS SO ORDERED.

16
17 Dated: 7/8/2011



CLAUDIA WILKEN
United States District Judge